policies in segments of the telecommunications market other than broadcasting." Id. at 1448-49.

The Commission also awarded Section 1071 tax certificates to telephone companies that were forced to divest themselves of cable systems as a result of the cable cross ownership rules. In this instance the Commission explained: "[t]he term 'radio broadcast stations' refers not only to AM, FM and TV broadcast stations, but also to cable television broadcast networks, both of which provide a mass communications service ancillary to broadcasting and hence are subject to Commission regulation." Continental Telephone Corp., 43 FCC 2d 827, 838 (1973), recon., 51 FCC 2d 284 (1975). Thus, GTE believes the Commission has used Section 1071 of the Code in the past whenever to do so effectuated a Commission policy.

Since any compensation received by an incumbent 2 GHz licensee to relocate from its spectrum would be in support of the Commission's policy and statutory mandate to encourage new technologies, GTE believes tax certificates should be issued, if requested. However, GTE believes tax certificates should not be limited to the case where the compensation is re-invested in non-radio media, but also used where an incumbent is relocating to higher bands. The move to higher frequencies also furthers the Commission's objectives as does the move to non-radio media. It makes sense that the compensation received that is in excess of the tax basis should be available to re-invest in the new facilities whether they be radio or other media.

The issuance of a tax certificate should not be perceived as a windfall to the recipient (see NPRM footnote 20). Section 1071 of the Code simply allows the deferral of the payment of income taxes. It does not eliminate the ultimate liability for such tax. The incumbent would not be triggering any current tax gain but for the requirement to relocate from the spectrum in furtherance of the FCC's policy. Thus, any taxes triggered by the requirement to relocate from the spectrum should be deferred via the issuance of a tax certificate.

If there is excess compensation that is not reinvested, Section 1071 of the Code allows the taxpayer to either pay the income tax currently on the gain attributable to the excess or pay it via reductions of tax depreciation on existing property (i.e., tax basis reductions). Thus, there is no long-term deferral of tax on the gain attributable to any compensation in excess of the amounts reinvested, and, therefore, no tax "windfall."

In summary, Section 1071 of the Tax Code permits the FCC to grant tax certificates if the sale or exchange of property is certified by the FCC to be necessary or appropriate to effectuate a change in policy or new policy with respect to the ownership and control of the radio broadcasting stations. The practical effect of Section 1071 of the Code is to entitle the recipient to defer payment of income tax on the sale. Past precedent indicates that the FCC has read the statutory words "radio broadcasting stations" expansively to include other non-broadcast communications entities, and it should do so here.

There will be an upper limit for windfall compensation and some parties may not have to move at all.

Although the FCC is concerned over the potential for windfalls to current incumbents using spectrum, the market will provide a natural limit to such compensation. First of all, GTE believes the FCC needs to identify who will be the licensee(s) for the spectrum at issue and the extent of geographic coverage. These issues must be resolved in the actual proceeding allocating the spectrum for the new emerging technology and are not questions for this proceeding. For example, if the FCC were to allocate spectrum for PCS, those decisions would be made in the context of GEN Docket No. 90-314 after the FCC determined matters such as: the demand for PCS, how much spectrum to allocate, the number of licensees, how to assign spectrum, scope of geographic coverage area, licensing eligibility, methods to minimize speculation, and financial and technical qualifications.

For example, if a successful PCS licensee finds it can meet the demand for its service within the available "vacant" spectrum in a geographic area, it will set a value of "zero" on the spectrum of the incumbent. (See NPRM, para. 22: "[S]ome new technology services will be able immediately to operate in segments of the emerging technology bands not presently used by existing 2 GHz licensees in some areas.") On the other hand, if the successful PCS licensee determines it would need to incur an incremental expense of $1 million to procure frequency-agile equipment or other technology to avoid interference with the current incumbent spectrum user, then that incremental value becomes the natural "cap" on the value of the spectrum. If the incumbent were greedy, the PCS licensee could cap its investment by buying equipment that could operate around the channels being used and just wait until the end of the transition period when the incumbent's spectrum rights fall to zero or continue using frequency agile equipment if there is no transition period.

Some parties have already advised the Commission that incumbents are willing to negotiate for their spectrum rights so such a market-based approach may work so long as the FCC determines who is eligible to be a negotiator and takes steps to screen mere speculators.[22] Spectrum assignment and negotiations should be separate processes. The FCC should first determine who will be the licensee, and then that licensee can negotiate with the incumbents. In other words, the spectrum is not being sold to the highest bidder as it might be in an auction, but, instead, made available to technically and financially qualified applicants who then can negotiate an early release of spectrum from incumbents if this is their best method of assuring no interference.[23]

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22 Wayne Schelle, Chairman of American Personal Communications cited successes in talks with current 2 GHz incumbents during his testimony June 3, 1992 before the Senate Communications Subcommittee hearing.

23 As the NPRM points out (para. 31), the FCC's proposal only covers the "allocation" of spectrum and not the "licensing" of systems or stations, which is the "assignment" process.

If the Commission takes the approach advocated by GTE and determines that some facilities can remain indefinitely at 2 GHz since there is insufficient demand for massive amounts of spectrum in some areas for emerging technologies (e.g., rural areas), then these incumbent licensees will be spared any involvement in negotiations and there will also be no opportunity to gain windfalls. However, such "permanent" 2 GHz users may be shifted and concentrated to a portion of the 2 GHz band by the FCC, if it makes technical sense to do so. If the FCC decides not to allow any "indefinite" 2 GHz primary licensees, another alternative would be to have such incumbent users in rural areas on the high side of the transition period (e.g., 15 years -- the useful life of the equipment) while users in urban areas, where there may be more demand for emerging technologies, would be on a 10 year transition period (i.e., the amortization period of much of the existing equipment).

Actual allocation decisions are best made in the context of a particular proposal supported by a detailed demand study.

Although the FCC requests comment regarding the criteria to be applied in determining whether a new service or expansion of an existing service merits frequencies from the emerging technologies band (NPRM, para. 28), this allocation question is best answered in the context of particular proposals. The only generalized criteria GTE could offer would be the same ones that might be used to define the public interest: clearly identified demand not being met by other services; widely-available service; broad public use and benefit; ability to attract capital and be implemented in a reasonable timeframe; spectrum is the best way to deliver the service; technically feasible service; and affordable.[24]

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[24] The Commission could also look to the six general principles initially developed in 1936 in Docket 8929 and in 1944 in Docket 6651. The guidelines were further enunciated in FCC, Draft Report of Proposed Allocation from 25,000 Kilocycle to 30,000 Kilocycles, at 18-20, January 15, 1945, republished in Order of Inquiry in Docket 11997, 22 Fed. Reg. 2684, 2685, Appendix

In any allocation decision, the FCC should be wary of "claims" of non-interference and require a stringent technical demonstration.

However, in allocating spectrum for particular new technologies, the FCC should require a high burden of proof to "claims" that frequencies can be shared without causing any interference to current incumbents. Such claims were made by some parties and the record thus far does not support the claims.[25] The public interest would not be served by licensing an interfering technology and then having to solve the interference problem well down the road. Thus, in response to NPRM, para, 24, GTE has seen no convincing proof that co-primary operation on the same frequencies in the same geographic area, with high traffic loads is technically feasible (i.e., the "stealth overlay").[26]

A (1957). The six general principles used to guide allocation decisions are: (1) determine whether, considering both national policy and relative costs, the service in question requires the use of radio spectrum or whether wireline service is a practicable substitute; (2) recognize that not all radio services should be given equal weight in making allocation decisions: greater emphasis should be placed on services necessary for safety of life and property, rather than on services which are more in the nature of luxuries or conveniences; (3) consider the total number of people likely to benefit from the proposed service; (4) consider, particularly when evaluating allocations for proposed new services, whether the service will meet a substantial public need and whether the service can be established on a practical working basis; (5) assign a service to that portion of the spectrum where it can operate most effectively, in light of propagation characteristics; and (6) evaluate certain factors in determining whether the frequencies of an operating service should be changed to accommodate a new one, in particular, consider the number of transmitters and receivers already in use, the investment of the industry and the public in equipment, the cost and feasibility of converting the equipment for operation on new frequencies and the time required for an orderly change to new frequencies. GTE submits that these principles which have guided spectrum decisions for fifty years are still valid today.

25 See GTE Comments on PCN America Progress Report on Experimental Field Trials, Experimental License FCC File No. 1343-EX-PL-90 filed July 24, 1991, and the letter from Dr. Thomas Stanley to PCN America dated August 12, 1991. The FCC requested a full examination of the potential for base stations to cause interference to microwave users and examinations of the effects of various cell site loading levels on the potential to cause interference.

26 In BellCore's January 15, 1992 response to the FCC's December 26, 1991 letter to Dr. Donald C. Cox, one of the En Banc panelists, pp. 4-6, BellCore also addressed the issue of spread spectrum overlays on current users. BellCore concluded: "[R]egardless of their deficiencies, the reported [PCN America] results demonstrated that spread spectrum techniques, by themselves, were not adequate to permit PCS spread spectrum sharing with point-to-point microwave in the same geographical vicinity." (Id. at 5)

CONCLUSION

GTE supports the Commission's efforts to establish a spectrum reserve provided the issues raised by GTE in its Comments are addressed.

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June 5, 1992

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Certificate of Service

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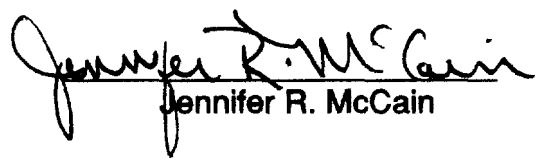

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